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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, ET AL.,
Appellees

APPEAL FROM THE SUPREME COURT OF TEXAS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Michigan-Wisconsin Pipe Line Company (hereafter sometimes referred to as "Michigan-Wisconsin") submits its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the order and judgment of the Supreme Court of Texas in which that Court refused to issue a writ of error to the Court of Civil Appeal for the Third Supreme Judicial District of Texas for the purpose of reviewing the judgment of such Court of Civil Appeals in Cause No. 10,117 on its docket.

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As is explained hereinafter under the heading "Jurisdiction," this appeal from the Supreme Court of Texas is taken as a precaution, in the alternative to an appeal which is being taken concurrently with this appeal from the Court of Civil Appeals for the Third Supreme Judicial District of Texas from the judgment entered by such Court of Civil Appeals in such Cause No. 10,117.

Opinion Below

Neither the trial judge nor the Supreme Court of Texas filed an opinion. The opinion of the Court of Civil Appeals is reported at 255 S. W. 2d 535, and a copy is attached hereto as Appendix A.* A copy of the order of the Supreme Court of Texas refusing writ of error is attached as Appendix C.

Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce and measured by the volumes of gas so received into such pipelines may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act[1]—is here involved. A copy of Section XXIII is attached hereto as Appendix

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* (Clerk's Note. This opinion is printed as Appendix "A" to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

[1] Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

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B,* and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are here quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent)

> "In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

> "In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

Statement

Michigan-Wisconsin is a natural gas pipeline company holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U. S. C., Sec. 717 et seq. It owns and operates a pipeline transportation system which originates in the Panhandle of Texas, less than two miles from the Oklahoma state line, and terminates at various points in the States of Michigan and Wisconsin. At these points and at other points in

* (Clerk's Note.—This Statute is printed as Appendix "B" to the Statement as to Jurisdiction in No. 198 and is not reprinted here.)

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Missouri and Iowa, it sells natural gas to local distribution companies which serve domestic and industrial consumers in those areas. Its sole business is the interstate purchase, transportation and sale of natural gas.

All of the gas transported by Michigan-Wisconsin is purchased by it from Phillips Petroleum Company. That company operates a network of pipelines through which it brings the gas from individual wells or groups of wells to its gasoline plant located adjacent to the mouth of Michigan-Wisconsin's pipeline in Hansford County, Texas. At this plant certain liquefiable hydrocarbons (gasoline and other liquid products) are removed from the gas by Phillips, and remain the property of Phillips.

The remaining natural gas, known technically as "residue gas," flows from the absorbers in the Phillips gasoline plant through pipes owned by Phillips for 300 yards to the boundary between the property owned by that company and that of Michigan-Wisconsin. There, without any break in the flow, the gas enters the interstate pipeline system owned by Michigan-Wisconsin. It is at this point that title to the gas passes from Phillips to Michigan-Wisconsin, and it is this taking or receiving of gas by the latter into its lines which the statute here involved designates as the taxable incident, as will be pointed out in more detail below.

Following the receipt by Michigan-Wisconsin of the residue gas, such gas flows a short distance to a compressor station, where, by raising the pressure of the gas, appellant utilizes the expansion characteristics of the gas as the motive power for further moverment along its journey.[2] From the compressor station in Texas, the gas flows through

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[2] A schematic diagram of the operations just described is attached as Appendix B to the opinion of the Court of Civil Appeals, Appendix A, *infra*, 255 S.W. 2d at 548. (Clerk's Note. This diagram is reproduced as an Appendix to the Statement as Jurisdiction in No. 198 and is not reproduced here.)

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appellant's pipeline system 1.74 miles to the Oklahoma border and thence to the consuming markets in other states. Additional motive power for this journey is furnished by 15 other compressor stations which are operated in other states through which the gas is transported. It was stipulated by the parties, and the Court of Civil Appeals found:

> "The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.
>
> "All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported." Appendix A, *infra*, 255 S. W. 2d at 539.

Section XXIII of H. B. 285, the statute here involved, levies a tax of 9/20 of one cent per thousand cubic feet upon every person engaged in taking possession of gas for transmission by pipeline, "for the privilege of engaging in such business" (Sec. 2). Reduced to its essentials, therefore, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Michigan-Wisconsin for the *privilege* of taking possession of natural gas at the inlet of its pipeline for direct, immediate and invariable transportation in interstate commerce.

The taxes levied by Section XXIII were paid by Michigan-Wisconsin under protest, pursuant to the provisions of the statutes of Texas,[3] and a suit for their recovery was properly filed against the appropriate state officials in a state district court at Austin, Texas. That Court entered judg-

[3] Article 7057b, Vernon's Annotated Civil Statutes.

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ment for Michigan-Wisconsin for the full amount of the taxes paid plus interest as provided by statute, holding Section XXIII to be violative of the Commerce Clause of the Constitution of the United States. Upon the State's appeal to the Court of Civil Appeals, that Court reversed the judgment of the district court, holding the statute valid under the Commerce Clause. Following denial of its motion for rehearing, Michigan-Wisconsin filed an application for writ of error in the Supreme Court of Texas, but that Court refused the application and denied motion for rehearing. By this appeal, appellant seeks review of the refusal of the Supreme Court of Texas to grant a writ of error for the purpose of reviewing the order and judgment of the Supreme Court of Texas in which that Court refused to issue a writ of error to the Court of Civil Appeals for the purpose of reviewing the judgment of such Court of Civil Appeals which sustained the validity of Section XXIII as applied to appellant's operations against appellant's claim of unconstitutionality under the Commerce Clause.

Jurisdiction

Appellant's application for writ of error was refused by the Supreme Court of Texas on May 6, 1953, and its motion for rehearing was denied on June 3, 1953. A petition for appeal was presented to the Chief Justice of that Court on June 25, 1953.

The jurisdiction of this Court to review by appeal the decision of the highest court of a state is conferred by Title 28 U. S. C., Sec. 1257(2). In early cases such as *Bacon* v. *Texas,* 163 U. S. 207 (1896), and *San Antonio & Aransas Pass Ry. Co.* v. *Wagner,* 241 U.S. 476 (1916), this Court held that, where the Texas Supreme Court denied a writ of error to review the judgment of a Court of Civil Appeals, the latter Court was "the highest court of a state

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in which a decision could be had," within the meaning of Title 28 U.S.C., Sec. 1257.

In 1927, there was added to Article 1728 of the Revised Civil Statutes of Texas an amendment which provided that, when the Texas Supreme Court believes that the judgment of a Court of Civil Appeals is a correct one and that the principles of law declared in the opinion of the latter Court are correctly determined, the Supreme Court will refuse an application for writ of error. This same provision has been carried over into Rule 483 of the Texas Rules of Civil Procedure.[4] Hence, since 1927, the refusal of a writ by the Texas Supreme Court has constituted at least an implied expression with respect to the merits of the decision of the Court of Civil Appeals. This fact affords basis for an argument that decisions in cases such as the *Bacon* and *Wagner* cases, *supra,* are no longer controlling and that, under decisions such as those in *Hetrick* v. *Lindsey,* 265 U.S. 384, (1924) and *Matthews* v. *Huwe,* 269 U.S. 262 (1925), whenever the Texas Supreme Court refuses an application for writ of error, that Court is the one from which an appeal or petition for certiorari to this Court should be prosecuted. Cf. *American Railway Express Co.* v. *Levee,* 263 U.S. 19 (1923).

This question was squarely raised in a motion to dismiss which was filed in connection with the appeal in *United Gas Public Service Co.* v. *Texas,* 301 U.S. 667 (1937). This court denied the motion, citing, inter alia, *Norfolk & Suburban Turnpike Co.* v. *Virginia,* 225 U.S. 264 (1912). From such action, it might be inferred that this Court believes that the refusal of a writ by the Texas Supreme Court is not "an affirmance in express terms" within the holding of the *Norfolk* case, with the result that appeals and petitions for certiorari should continue to be prosecuted from the

[4] A copy of Rule 483 is attached hereto as Appendix D.

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Court of Civil Appeals in cases where the Texas Supreme Court has refused writ of error. This inference is strengthened by the fact that in *Lone Star Gas Co.* v. *Texas*, 304 U.S. 224 (1938), this Court entertained an appeal from a Court of Civil Appeals in a situation in which the Texas Supreme Court had refused a writ. In both the *United* case and the *Lone Star* case, this Court directed its mandate to the Court of Civil Appeals, and this Court stated in such mandate that it had reviewed the judgment of the Court of Civil Appeals.

However, in *Sweatt* v. *Painter*, 339 U.S. 629 (1950), which was also a case in which the only action by the Texas Supreme Court was the refusal of a writ, this Court directed its writ of certiorari to the Texas Supreme Court rather than to the Court of Civil Appeals. In addition, this Court also directed its mandate to the Texas Supreme Court, and this Court stated in such mandate that the judgment which it had reviewed was the judgment in which the Texas Supreme Court refused the application for writ of error.

The *Sweatt* case is the latest Texas case to come before this Court involving the refusal of a writ of error. In view of the fact that the writ of certiorari in that case was issued to the Texas Supreme Court, appellant feels that it cannot with safety rely upon the prior cases in which appeals and writs of certiorari have come from, or been directed to, the Courts of Civil Appeals. Hence, as a matter of precaution, appellant is filing this appeal from the Supreme Court of Texas in the alternative to the appeal which it is concurrently filing from the Court of Civil Appeals. Precedent for such action is found in *Western Union Telegraph Co.* v. *Priester*, 276 U.S. 252 (1928). See also Stern and Gressman, *Supreme Court Practice*, p. 165.

Except for formal matters and differences in the discussions of technical jurisdiction, this "Statement as to Juris-

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diction" is identical with that which is filed with the appeal from the Court of Civil Appeals.

Manner In Which Federal Question Was Raised

Appellant challenged the validity of Section XXIII under the Commerce Clause of the Federal Constitution specifically and in detail at every stage of the proceedings in the state courts: In its protests (made concurrently with the monthly payments of the tax), its pleadings in the trial court, its brief and motion for rehearing in the Court of Civil Appeals, and in its application for writ of error and motion for rehearing in the Supreme Court of Texas. The Court of Civil Appeals itself stated in the opinion: "The single question presented for our decision is whether Article 7057f, a revenue statute, . . . as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid."[5] This Court will accept the recognition by the Court of Civil Appeals that the constitutional issue was properly raised in the State Courts. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 185 (1945).

The Question Presented By This Appeal Is Substantial

There is but one issue involved in this appeal and that taken by Panhandle Eastern Pipe Line Company in a companion case: Whether the so-called "gathering tax" imposed by the State of Texas upon interstate carriers of natural gas for the *privilege* of receiving such gas into the mouths of their interstate pipelines can stand consistently with the Commerce Clause of the Constitution. The facts are simple, the issue clear cut. Because the supply of natural gas is concentrated so heavily in Texas and a few other states, a tax upon the receipt of such gas by interstate pipe-

[5] Appendix A, *infra;* 255 S.W. 2d at 537-8.

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lines for transportation to the great majority of consumer states has wide and important national repercussions.

The cases now before this Court on appeal were selected by the State of Texas and the pipeline companies as typical test cases through which a conclusive determination of the constitutionality of the "gathering tax" statute as applied to pipeline companies taking gas into their pipelines for transportation to other states could be obtained. Accordingly, all lawsuits initiated by others who paid the tax under protest, of which 117 had been filed as of June 12, 1953, have been stayed pending final decision of the Michigan-Wisconsin and Panhandle Eastern cases and will be affected by such decisions. As of that date also, 15.6 millions of dollars of taxes had been paid under protest, and that amount continues to increase at the rate of one million dollars a month.

It is recognized that the substantiality of an appeal is not measured by dollar amounts or even by the number of cases affected by this Court's decision. Undoubtedly, this Court refuses to entertain many applications for further review which involve large sums of money but which raise frivolous or settled federal questions. That the instant appeals are of quite a different character is significantly indicated by the fact that an able and experienced state trial judge found the statute to be incompatible with the Commerce Clause, and the Court of Civil Appeals was able to say no more than:

> "We have no clear or strong conviction that this statute and the Constitution are incompatible." Appendix A, *infra*; 255 S.W. 2d at 546.[6]

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[6] The State Court in effect invited this Court's review of its decision by stating:

> "The law will now be inquired into and our conclusions stated as briefly as possible. This we do with full knowledge that the only forum having ultimate and exclusive jurisdiction to authoritatively determine the issue before us is the Supprreme Court of the United States."

Appendix A, *infra;* 255 S.W. 2d at 543.

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Appellant suggests, however, that the substantiality of this appeal may be judged by a more objective standard—the effect of the statute here involved upon the great national purposes which the Commerce Clause was designed to accomplish. The origins of that clause are to be found, of course, in the commercial warfare between the thirteen original states which began after independence had been won. This Court recently quoted Mr. Justice Story to the effect that during that interval:

> "... each State would legislate according to its estimate of its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." Story, *The Constitution*, Sec. 259.

This came "to threaten at once the peace and safety of the Union." *Id.* § 260.[7]

As will be shown below, the statute here under consideration was passed by the Texas Legislature as a result of a frank and open estimate of the very local interests referred to by Mr. Justice Story. The statute was deliberately aimed at gas moving in interstate commerce; it was designed to produce revenue for the State of Texas by exacting a toll from interstate commerce; and, since, as applied to interstate pipelines, the burden of the tax ultimately will be borne by those persons in other states who consume the gas, the statute enables the State of Texas to achieve the politically popular result of raising revenue at the ultimate expense of citizens of other states. In upholding such a statute, the Court of Civil Appeals disregarded the principles applied in every decision of this Court which is in any way analagous.

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[7] See *Hood* v. *DuMond*, 336 U.S. 525, 533 (1949).

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1. The Background and Purpose of the Statute

The tax here involved is labeled a gas "gathering tax" and purports to be imposed for the privilege of engaging in the occupation of "gathering gas." However, the term, "gathering," has long been used in the gas and oil industry to mean the picking up of gas or oil at individual wells in the field and assembling it at a common point. *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484 (1934). Michigan-Wisconsin engages in no such activity. Indeed, the Attorney General of Texas stipulated that Michigan-Wisconsin "gathers" no gas within the meaning of that term, as it is consistently used in the gas industry and in ordinary usage.

Thus, what the Texas Legislature did was to take a well-understood term and give it an artificial definition in the statute. "Gathering gas," as there defined, means the "first taking" of possession of gas by a pipeline company "for other processing or transmission" through its pipeline after the gas passes through the outlet of a gasoline plant. It is not Phillips Petroleum Company, the real "gatherer" of the gas in this case, that pays the tax, but Michigan-Wisconsin, which does no more than receive the gas into the mouth of its pipeline for immediate interstate transportation. Of course, the legislature may define its terms as it chooses. Nevertheless, its appropriation of a well-understood term to describe a totally different activity, upon which the tax is imposed, is sufficient alone to justify a suspicion that the tax is one which, in the words of Mr. Justice Brandeis, is "furtively directed" at interstate commerce.[8]

The legislature's purpose was more candidly stated in the report to the House of Representatives by a member of the House-Senate conference committee, who said:

> "You will further recall that by practically every vote that was taken here in the House that we have

[8] *Cudahy Packing Co.* v. *Hinkle*, 278 U.S. 460, 468 (1929).

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shown conclusively that *we want a tax on the gas that leaves the State of Texas.* Your Committee feels that the House still wants that very thing. . . . To be perfectly frank with you, and I have nothing whatsoever to hide, that suggested compromise is a cross between a gathering tax and the Hull-Vick amendment. *It will tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries.* . . . You know we have approximately twelve million dollars to raise and you people know that twelve million dollars is a large amount of money and it will vitally affect the ones that have to pay it. . . . I say to you that the issue is now drawn as to whether or not gas piped out of Texas will be taxed or the money will be raised by adding to the already overtaxed landowner, royalty owner and producer. *I believe that the people of Texas want the gas piped out of the State to be taxed.*" House Journal, June 1, 1951, p. 2979. (Emphasis supplied.) [9]

Here, at any rate, there is no subterfuge. In order to raise additional money for state purposes, and at the same time to lessen the over-all tax burden on state residents, the Texas legislature is in effect attempting to levy a tax upon the people of Michigan and Wisconsin, of Ohio, Kentucky, Indiana and a host of other states; and the interstate commerce among the states, which it was the purpose of the Commerce Clause to protect, is the medium by which this shifting of the burden of taxation is sought to be accomplished.

If any further evidence were needed of the purpose of this statute to tax the consumers of gas in other states by a tax on interstate transportation agencies, it may readily

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[9] Of course, the gas that is piped out of Texas is already heavily taxed. The state now levies a production tax amounting to 5.72 per cent of the value of the gas and the producer pays an additional ad valorem tax on the value of his lease and producing facilities. Appellant pays an ad valorem tax on the value of its facilities in the state.

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be found in two other provisions of Section XXIII. In the first place, Section 4 makes it unlawful for any "gas gatherer" (i. e. interstate pipeline company) to attempt by contract to shift the tax to a producer. In other words, producers of gas cannot under any circumstances be made to bear the burden of this tax; it must at all events be borne by the pipeline companies and their customers, the consumers.

In the second place, Section XXIII expressly provides in Section 11:

> "In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

The greater portion of the natural gas produced in Texas is transported to other states for consumption. The Texas legislature has made it perfectly plain that the purpose of the statute will not be accomplished if it cannot be lawfully applied to gas which moves in interstate commerce.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce, or a bolder attempt to make interstate commerce (i. e., the people of other states) bear the burdens of a state's local government.

2. The Effect of the "Gathering Tax" on Interstate Commerce

Every cubic foot of natural gas that leaves the State of Texas is taxed at the rate of 9/20 of a cent per thousand cubic feet. Every gas pipeline company operating lines leaving the state is subject to the tax simply because it "takes possession" of the product within the State for the purpose of transporting it. Obviously, no gas can be transported in interstate commerce unless the carrier first

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"takes possession" of it. Obviously, too, the Commerce Clause knows no differences of principle based upon the product involved or the method of its carriage. Thus, if Texas may lawfully tax carriers of gas for the privilege of "taking possession" of that commodity for immediate interstate transportation, Minnesota may clearly tax the owners of ore boats for the privilege of "taking possession" of iron ore at Duluth for immediate transportation to Gary; West Virginia certainly may tax the railroads at so much per ton of coal for the privilege of "taking possession" of that coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The Commerce Clause was designed to end precisely this kind of impost laid upon commercial intercourse between the states. The tax here involved has exactly the same effect as if Texas had erected custom-houses at points where its highways cross over into other states and was requiring every carrier, upon leaving Texas, to pay a tax on the goods carried, for the privilege of having "taken possession" of those goods within the State. If that kind of tax is to be held valid, custom-houses will certainly spring up on the other side of the State's boundaries in retaliation, and every state may soon be expected to tax heavily the export of those of its products which are most valuable to its neighbors. Cf. *Case of the State Freight Tax*, 15 Wall. 232, 276.

The vice of the present statute is particularly pronounced because of the fact that it concerns a product found in relatively few states but desired in many. From the State of Texas, for example, natural gas flows to some 38 other states. Gas transported by Michigan-Wisconsin alone serves consumers in Missouri, Iowa, Michigan and Wisconsin, and consumers of gas carried by Panhandle Eastern

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Pipe Line Company reside in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. The State of Texas thus has a tremendous leverage which it can exert through a tax upon a product dispersed so widely from a single source. Cf. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433-434 (1947).

Another effect upon interstate commerce should be noted, namely, that the tax is related arithmetically to the volume of such commerce. Since the tax is fixed at 9/20 of a cent per m. c. f. of gas of which Michigan-Wisconsin "takes possession" for transportation through its pipeline, and since *all* of the gas so taken moves immediately and directly in interstate commerce, the result is that the tax is measured strictly by the amount of interstate commerce which appellant carries on.

Just as in the cases where a state has taxed the entire gross receipts derived from interstate commerce, the "gathering tax" is measured not only by the amount of business done within the state but by the amount done in other states as well. That is, the 9/20 of a cent per m. c. f. obviously does not attempt to measure the activities carried on by Michigan-Wisconsin within the State of Texas. Appellant pays as much in taxes per unit of volume for the "privilege" of taking possession of gas which it transports a mere 1.74 miles to the Oklahoma line and a thousand miles beyond as is paid by a company which operates a pipeline 500 miles within Texas and only five miles beyond. The words of Mr. Justice Stone, speaking for the Court in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 439, are therefore applicable *in toto* to the present tax:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state: If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay

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> a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of multiple burden to which local commerce is not exposed." [10]

Similarly, in the present case, gas transported by a pipeline solely within the State of Texas would be subject to a single tax of 9/20 of a cent per m.c.f., whereas Michigan-Wisconsin would be subject to an additional tax on a comparable fictitious "local activity" in every state through which its pipeline runs. It is nonsense to say that only Texas could lay such a tax because it is the state of origin of the commerce. If Texas may impose a tax upon pipelines for the privilege of "taking or retaining possession" of the gas in Texas for transportation elsewhere, Oklahoma may levy a tax, measured by the entire volumes of gas transported, for "taking or retaining possession" of the gas within that state, or on any other activity within that state which contributes to the interstate movement of the gas—and so may Missouri, Iowa, Michigan and Wisconsin.

The fact that Congress considers the activities of Michigan-Wisconsin and other interstate pipeline companies to be within the sphere of national interest is indicated by the terms of the Natural Gas Act.[11] Michigan-Wisconsin could

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[10] The Court also noted: "Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state *and burdens the commerce in direct proportion to its volume.*" 305 U.S. at 438. (Emphasis supplied)

[11] Title 15, U.S.C., Sec. 717 (a).

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not have laid a foot of pipe in Texas or elsewhere without first having obtained a certificate of convenience and necessity from the Federal Power Commission, and the rates at which it sells gas to distribution companies at the terimini of its line are subject to the Commission's regulation.

In this connection, the sale of gas by Phillips to Michigan-Wisconsin, which is coincident with the "taking" of the gas by appellant under the Texas statute, was the subject of a very recent decision of the Court of Civil Appeals for the District of Columbia. *Wisconsin* v. *Federal Power Commission,* No. 11,247, decided May 22, 1953. The question there involved was whether the Federal Power Commission, under the Natural Gas Act, has jurisdiction over that sale, or whether it is a part of the actual "gathering" process conducted by Phillips and thus exempt under the terms of Title 15 U.S.C., Sec. 717(b). The Court of Appeals held that the Commission has jurisdiction over such sale under the Act. It is significant for present purposes that the Court and all parties to that litigation, including the Commission itself, agreed that the sale and delivery from Phillips to Michigan-Wisconsin are a sale and delivery in interstate commerce. Thus, there was unanimity in the view that the sale and delivery by which Michigan-Wisconsin is enabled to "take possession" of the gas—the act for which it is taxed by Texas—are a sale and delivery in interstate commerce.

It is submitted that the Texas "gathering tax" is violative of the basic purposes and precepts of the Commerce Clause. It has accomplished what its sponsors desired, namely, to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." But purposes of this kind are precisely what the Commerce Clause was designed to prevent.

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3. The Decision of the Court of Civil Appeals, Approved by the Refusal of the Supreme Court of Texas to Grant Writ of Error, Is Contrary To This Court's Decisions.

In referring to the decisions of this Court which were cited in the briefs of the parties, the Court of Civil Appeals said, "None of these cases is factually in point," and the Court added that its decision must therefore "turn upon a practical application of basic principles adduced from these authorities to the facts."[12] Insofar as the Court's opinion is capable of rationalization, it appears to rest upon the theory that the taking possession of gas for transportation is a "local activity" separate from interstate commerce and thus not subject to the prohibitions of the Commerce Clause. Aside from the quotation of general statements from certain of this Court's opinions, the Court of Civil Appeals apparently placed sole reliance upon *Utah Power & Light* v. *Pfost*, 286 U.S. 165 (1932), where the *generation* of electric power was held to be sufficiently separate from its *transmission* to sustain a state tax. Cf. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The attempted isolation of a pretended or fictitious "local activity" engaged in by an interstate business as the incident to be taxed has been a favorite but futile device by which attempts have repeatedly been made to circumvent the Commerce Clause. This Court stated in *Nippert* v. *Richmond*, 327 U.S. 416, 423 (1946):

> ". . . If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be

[12] Appendix A, *infra;* 255 S.W. 2d at 543.

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> subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an Act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

That the State of Texas did in this case "carve out from what is an entire or integral economic process" a particular phase or incident, which it has labeled as "separate and distinct" or "local" cannot be gainsaid. *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, 393 (1952). It is argued that the act of "taking possession" of gas for transmission interstate through a pipeline is separate and distinct from that transmission. How can a carrier possibly transport goods unless it first "takes possession" of them? One can readily visualize *production* of a commodity without transportation, and it is on this basis that taxes on the production of goods for subsequent transportation in interstate commerce have been sustained. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 180, 182 (1932); *Hope Natural Gas Co.* v. *Hall*, 274 U. S. 284, 288 (1927); *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172, 178 (1923).[13] But is it possible to

[13] The very distinction which the Court of Civil Appeals refused to recognize is specifically drawn in the *Pfost* case, upon which the state court relied. In that case this Court stated: "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." 286 U.S. at 180-181.

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visualize the transportation of an article apart from the carrier's taking possession of the article? Under any conceivable view of the economic process of transportation, one is an inseparable, indivisible part of the other.

That, certainly, has always been this Court's view of the process of "taking possession" of goods for interstate commerce. In the so-called "stevedoring cases," *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down state statutes which levied a tax upon the receipts of companies engaged in loading ships for interstate commerce. In its opinion in the earlier case this Court pointed out:

> "The business of appellant, insofar as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.
>
> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination . . ." 302 U. S. at 92.

And in the *Carter & Weekes* case, this Court said:

> ". . . The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-8.

It is not without significance that the Court of Civil Appeals, in describing Panhandle Eastern's activities, stated that "Panhandle *loads* its interstate pipeline with gas from the outlets of three gasoline plants. . . ."[14] It is this

[14] Appendix A, *infra*; 255 S.W. 2d at 539; emphasis supplied.

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very act of "loading its pipeline" upon which the State of Texas has placed an occupation tax, despite the fact that this Court has said that interstate commerce, "at the least, begins with loading and ends with unloading."

Similarly, in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196 (1885), this Court struck down a state tax upon a ferry company operating between Philadelphia and Gloucester, New Jersey, saying:

> ". . . the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of persons or property at some point and putting them down at another.* A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." 114 U. S. at 203. (Emphasis supplied.)

This statement is a conclusive answer to the contention that interstate pipeline companies may constitutionally be taxed for the privilege of receiving gas into their pipelines, which is the method by which they "take possession" of the gas. The activity of receiving gas for interstate transportation is not "local" in the sense that it is one that is carved out of the integral economic process of the transportation itself.

Once the gas is "taken" by Michigan-Wisconsin at the mouth of its pipeline, the gas can have but one destination —the ultimate markets in Missouri, Iowa, Michigan and Wisconsin. This is true, first, because the pipeline has no other outlets within (or without) the State of Texas through which gas might be diverted, and, second, because appellant's certificates of convenience and necessity specify points outside of Texas to which and to whom the gas must

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be delivered. This case thus presents the ultimate in certainty of interstate destination from the moment Michigan-Wisconsin takes possession of the gas.[15]

This case also presents the ultimate in continuity of interstate movement. As indicated above, the parties have stipulated, and the Court below noted:

> "The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipelines to consumers in Michigan and Wisconsin is a steady and continuous flow." (Appendix A, *infra;* 255 S.W. 2d at 539.)

There is no storage here involved, no break, no hesitation, but a continuous even movement into appellant's pipeline, through its compressor station and across the state line.[16]

There remains one statement in the opinion of the Court of Civil Appeals about which comment should be made. At the conclusion of its opinion, the Court stated:

> "The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time the gas is finally committed to its interstate journey." Appendix A, *infra;* 255 U.S. 2d at 546.

Appellant is frankly at a loss to know what "further processing" Michigan-Wisconsin conducts in the State of Texas —or anywhere else. After the gas enters Michigan-Wiscon-

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[15] As a matter of fact, the destination of the residue gas purchased by Michigan-Wisconsin from Phillips is fixed from the moment it leaves the wellhead, since Phillips is bound by contract to deliver to Michigan-Wisconsin the residue gas from all wells drilled in acreage "dedicated" to the latter. *Eureka Pipe Line Co.* v. *Hallanan,* 256 U.S. 265 (1921); *United Fuel Co.* v. *Hallanan,* 257 U.S. 277 (1921); *Peoples Natural Gas Co.* v. *Pub. Serv. Com.,* 270 U.S. 550 (1926).

[16] Under circumstances of similar continuity of movement and certainty of destination, this Court had "no doubt" that the movement of gas was in interstate commerce. *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 687 (1947).

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sin's lines it goes immediately into a compressor station and thence into appellant's 24-inch line and immediately across the state line into Oklahoma.

If, by "further processing," the Court meant the operation of appellant's compressor station, the statement is without foundation. The only purpose of the compressor station, as this Court knows, is to build up pressure sufficient to move the gas along the pipeline.[17] It supplies the motive power by which interstate commerce is conducted, just as a locomotive, a truck-tractor or a ship's turbine supplies the motive power for those forms of transportation. The Court of Civil Appeals itself noted earlier in its opinion:

> "The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin *and used exclusively by it in the taking and transportation of such gas.*" Appendix A, *infra;* 255 S.W. 2d at 539.

It is familiar law that facilities used in effectuating the interstate movement of goods are themselves in interstate commerce. Referring to the use of such facilities as a "processing" operation cannot change the facts, or the application of the Commerce Clause to the facts.

Moreover, contrary to the assertion of the Court below, the gas is "committed" to interstate commerce before it enters the compressor station in every conceivable sense of the word. It can go nowhere else, physically or contractually, from the moment it enters Michigan-Wisconsin's lines at the outlet of the Phillips gasoline plant. *Hughes Bros. Timber Co.* v. *Minn.*, 272 U.S. 469, 475-6 (1926). It does so invariably, unceasingly, unhesitatingly. How the gas could

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[17] In *Interstate Natural Gas Co.* v. *Federal Power Commission* (Note 15 supra), this Court stated that "the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin." 331 U.S. at 689.

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be more firmly "committed to interstate commerce" than is the case when appellant takes possession of the gas from Phillips is quite beyond comprehension.

Conclusion

Appellant respectfully suggests that enough has been presented to demonstrate that this appeal, and that filed by Panhandle Eastern Pipe Line Company in a companion case, bring before this Court a question under the Commerce Clause that is far reaching and important, both in terms of legal principles and of practical impact upon the consumers of gas throughout the nation.

In order to "tax the pipeline gas that goes out of the State of Texas," (House Journal, June 1, 1951, p. 2979), the state legislature has conjured up a fictitious name and a fictitious "local activity" upon which to impose the tax. The residents of the consuming states had no voice in that determination. But they had spoken over 150 years ago when their representatives drafted a Constitution which provided that no state may take any action which has the effect "of impeding the free flow of trade between the States." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). Judged by that standard, Section XXIII of H.B. 285, the Texas "gathering tax" statute, cannot stand.

Respectfully submitted,

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EXHIBIT "C"

IN THE SUPREME COURT OF TEXAS

From Travis County, Third District

May 6, 1953.

No. 4089

MICHIGAN-WISCONSIN PIPE LINE CO.

vs.

ROBERT S. CALVERT et al.

This day came on to be heard the application of petitioner for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that the application be refused; that the applicant, Michigan-Wisconsin Pipe Line Co., pay all costs incurred in this application.

June 3, 1953.

(No. A-4089)

The motion for rehearing herein having heretofore been submitted to the Court and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

APPENDIX "D"

RULE 483, TEXAS RULES OF CIVIL PROCEDURE

Rule 483. *Order on Application for Writ of Error* . . . . . .

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the Court

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of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, "Dismissed for want of jurisdiction."

Provided, that in cases of conflict named in Subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, 1925, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error. *As amended by order of Oct. 10, 1945, effective Feb. 1, 1946.*

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